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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-680

MARVIN MILLER, COVINA PUBLISHING, INC., a corporation doing business as COLLECTORS PUBLICATIONS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APP EALS FOR THE NINTH CIRCUIT

To the United States Supreme Court, October Term, 1974:

The petitioners, MARVIN MILLER, COVINA PUBLISHING, INC., a corporation doing business as COLLECTORS

PUBLICATIONS, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed November 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto (Appendix A). The opinion of the Court of Appeals of November 29, 1974 incorporates by reference its previous opinion reported at 431 F.2d 655. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

On November 29, 1974, the Court of Appeals for the Ninth Circuit entered judgment reaffirming appellants' conviction for violation of Title 18, United States Code, §§ 1461 and 1462 (Appendix B). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied January 27, 1975 (Appendix C). An Application for Extension of Time within which to file this petition was granted by the Honorable William J. Brennan, Jr. on Febraury 19, 1975, extending such time to March 28, 1975 (Appendix D).

The jursidiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

1. Whether the submission of this matter to the jury upon the incorrect standard of national community standards deprived the petitioners of the opportunity to present a defense based upon the appropriate local community.

2. Whether §§ 1461 and 1462 of Title 18, United States Code, are unconstitutional as applied to petitioners and violative of the First, Ninth and Fifth Amendments to the United States Constitution.

3. Whether the constitutional vagueness of Title 18, United States Code, §§ 1461 and 1462, prior to the "authoritative construction" in *Hamling v. United States*, ... U.S. ....., 94 S. Ct. 2887 (1974), precludes as a matter of law the establishment of scienter on behalf of petitioners.

4. Whether the imposing of incarceration pursuant to the conviction in the instant case constitutes cruel and unusual punishments in violation of the Eighth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 1461 declares unmailable:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . . . Every written or

printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained . . . . "

And further declares that–

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be non-mailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed . . . shall be fined . . . or imprisoned . . . . "

Section 1462 provides in part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce–(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character; . . . shall be fined . . . or imprisoned . . . . "

STATEMENT OF THE CASE

Indictment numbers 1842, 2166 and 2396 were filed on March 3, 1968 in the United States District Court for the Central District of California. These indictments charged petitioners and each of them with mailing and transporting through interstate commerce obscene materials. (CT[1] 1A.)

Indictment No. 1842 contained nine counts charging various violations of §§ 1461 and 1462 of Title 18. Indictment No. 2166 similarly charged nine counts of violation of Title 18 U.S.C. 1461. Indictment No. 2396 charged three counts of violation of Title 18, U.S.C., § 1461.

Among the pre-trial motions made by petitioner, and denied, was a request for an order allowing the jury to read comparative material. (CT 35, 110.)

The trial proceeded by jury in the United States District Court for the Central District of California, commencing on November 26, 1968. At the conclusion of the evidence, the jury found the defendants guilty of Counts III, IV, VI and VII in Indictment No. 1842, relating to the books "Restless Love" and "The Misfortunes of Mary"; guilty of Counts III and VI of Indictment No. 2166, involving a mailing of the book "Intercourse"; and guilty of Counts I and II of Indictment No. 2396, involving the mailing of advertisements for the books "Marital Intercourse," "The Name Is Bonnie" and "Intercourse," and (Count II) for mailing of the film "Intercourse" and an advertisement entitled "Man - Woman."

---

[1]As used herein "CT" refers to the Clerk's Transcript.

The petitioners were acquitted on counts, among others, charging the mailing of the book "Intercourse."

Motions for new trial, judgment of acquittal and in arrest of judgment were denied. (CT 301.)

The original opinion of the United States Court of Appeals for the Ninth Circuit, reported at 431 F.2d 655, was vacated upon order of this Court dated June 25, 1973 (..... U.S. ....., 93 S. Ct. 3030). Upon remand to the Court of Appeals, the matter was taken en banc by order of that Court dated October 17, 1973. Thereafter, by order of the Court of Appeals dated September 23, 1974, the matter was returned to the original panel for disposition (Appendix E). Thereafter, on November 29, 1974, the Court of Appeals for the Ninth Circuit entered judgment reaffirming appellants' conviction for violation of Title 18, United States Code, §§ 1461 and 1462.

A detailed statement of the case and of the facts is contained in the previously filed Petition for Writ of Certiorari, filed in the October Term, 1970, being No. 1288.

REASONS FOR GRANTING A WRIT

1. The jury in petitioners' case was instructed with regard to community standards as follows:

> "You must apply the standard of the contemporary national community–not just local or state–but what the community in general in the nation currently applies to what is patently offensive to them in the description of matters relating to sex." (RT[2] 1591.)

[2] "RT" refers to the Reporter's Transcript on Appeal.

This Court stated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 2619 (1973):

> "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."

The Court expressly recognized that:

> "The use of 'national' standards, however, necessarily implies that materials found tolerable in some places but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Ibid* at footnote 13.

The Court thus concluded:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City . . . . People in different states vary in their tastes and their attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." (93 S. Ct. at 2619 - 2620.)

This Court compared the result in *Miller* under national standards to the discredited test of *Regina v. Hicklin*, O.R. 3 Q.B. 360, which resulted in public availability of material inoffensive only to the most susceptible. The Court was thus obviously concerned with the stifling and chilling effect imposed by a national standard. One year after *Miller v. California, supra*, this

Court, in *Hamling v. United States,* ..... U.S. ....., 94 S. Ct. 2887, 2902, determined that references to community standards in the terms of "the country as a whole" delineated a "wider geographical area than would be warranted by *Miller* . . . . " (94 S. Ct. at 2902.) The Court in *Hamling,* therefore, at least reaffirmed the inappropriateness of the national community standard.

The effect of the instruction regarding the national community standard given to the jury in this case required that they determine that issue based upon national, "not just local or state," standards. As indicated in *Miller v. California, supra,* the acceptability of material within the Central District of California, including the large metropolitan area of Los Angeles, may be drastically different than the standard for the nation as a whole. Consequently, material may be protected within the Central District of California while based upon the "unascertainable" national standard the material would lose such protection. The petitioners in this case were precluded from offering or having the jury consider under appropriate instructions evidence with regard to the standard within the Central District of California. Clearly, the standard of that area is much more liberal in its acceptability of sexually related materials than other areas of the nation. The issue, however, is one of *fact.* Thus, neither an appellate court nor this Honorable Court may interpose its own determinations on that issue. The inability of petitioners to offer evidence on this more lenient standard deprives them of the right to have the jury determine each factual element of their case beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068 (1970).

2. In *Miller v. California, supra,* this Court announced new standards for determining the obscenity *vel non* of sexually oriented materials. The Court held that–

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (93 S. Ct. at 2615.)

At the same time, the Court rejected the "utterly without redeeming social value" test of *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Believing that the aforementioned guidelines would provide "fair notice to a dealer in such materials that his public and commercial activities may bring prosecution," the Court held that–

> "No one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct *specifically defined by the regulating state law, as written or construed.*" (Emphasis added.) (93 S. Ct. at 2616 - 2617.)

In another case decided the same day as the *Miller* case, *United States v. 12 200-Foot Reels of Super 8 mm Film, et al.,* 413 U.S. ....., 93 S. Ct. 2665 (1973), this Court held that the "standards for testing the constitu-

tionality of state legislation regulating obscenity . . . are applicable to federal legislation" (93 S. Ct. at 2670). Thus, the Supreme Court indicated that federal statutes purporting to regulate obscenity (to wit, §§ 1461 and 1462 of Title 18, United States Code) must be judicially construed according to the standards set forth in *Miller v. California, supra.*

In the case of *Hamling v. United States, supra,* the Court stated that § 1461 "did not offend the free speech and free press guarantees of the First Amendment and that it did not deny the due process guaranteed by the Fifth Amendment because 'too vague to support conviction for crime'."

The statement of the Court is strange and difficult to comprehend. *Roth* is cited as the basis for upholding the constitutionality of § 1461 and, concomitantly, the conviction of petitioners in *Hamling,* and yet *Roth* never authoritatively construed § 1461.

> "The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.
>
> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process."
>
> *Roth v. United States,* 354 U.S. 476, 491, 77 S. Ct. 1304, 1312.

This lack of precision in the statute, which was upheld as constitutional in *Roth,* is exactly what has been proscribed

and determined to be unconstitutional in *Miller.* Thus, the prevision of regulation in order to support the constitutionality of a statute, as required by the Court in *Miller* for state statutes, and which has already been shown to apply to federal statutes through *United States v. 12 200-Foot Reels of Film, supra,* has been completely dispensed with in *Hamling* –decided well after *Miller v. California.* Furthermore, *Hamling* purports to be totally consistent with the *Miller* decision. Yet, the Court in *Hamling* skirts around the requirements set forth in *Miller* for judging the obscenity *vel non* of sexually oriented materials and relies wholly on the *Roth* decision, which does not define, with any language even approaching specificity, the kinds of materials which could be found to be obscene.

Assuming that, even after the decision in *Miller v. California, supra,* the *Roth* standards are not too vague to support a criminal conviction, nevertheless, there is a line of judicial decisions which specifically hold a wide variety of sexually oriented materials to be protected under the First Amendment; i.e., to be not obscene. These materials are of the same or similar character as those involved in the instant appeal. Thus, if *Roth* is still good law, notwithstanding the rejection of the "utterly without redeeming social value" criterion and the replacement thereof with "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" criterion, then the instant conviction must be overturned. This is so because petitioners were relying on prior judicial decisions which held that similar acts were constitutionally protected. And this reliance is a valid defense.

Petitioners' actions were taken in good faith and in

reliance on court decisions interpreting statutory prohibitions. See 21 Am. Jur. 2d, pp. 177 - 178, § 96, "Reliance on Judicial Decisions."

If, however, the effect of *Hamling* is to overrule these prior decisions affording protection to these materials, then the conviction must also be overturned, because it punishes as criminal conduct acts which were previously protected. To do otherwise would be to countenance an *ex post facto* law, which is prohibited under Article 1, § 9 of the United States Constitution.

> "It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' *United States v. Hall,* 2 Wash. C.C. 377, Fed Case No. 15,285; *Kring v. Missouri,* 197 U.S. 221, 228, 2 S. Ct. 443; *In re Medley,* 134 U.S. 160, 171, 10 S. Ct. 284. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed."
>
> *Thompson v. State of Utah,* 170 U.S. 343, 18 S. Ct. 623 (1898).

At the very most, the material in question, which formed the basis for the instant conviction, may be suppressed or forfeited on a civil basis only. *Astol Calero-*

Toledo v. Pearson Yacht Leasing Co., ... U.S. ....., 94 S. Ct. 2080 (1974).

This Court analogized forfeiture statutes to *in rem* proceedings which historically operate without regard for any related innocent or criminal conduct. The Court quoted Mr. Justice Story in *The Palmyra*, 25 U.S. 1, 12 Wheat (1827):

> " . . . [T]he practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." (25 U.S. at 14 - 15, 94 S. Ct. at 2092.)

A reading of the *Calero-Toledo* case leads one inevitably to the conclusion that the Supreme Court decisions in *Roth, Miller*, and *Hamling* employed standards which can only be applied to civil forfeiture cases.

To sustain the conviction of petitioners in the instant case, based on a non-specific statute which at the time of the conviction had not yet been authoritatively construed, would be to deny due process. Criminal statutes must give fair and clear notice as to exactly what kind of conduct is proscribed in order to be constitutionally upheld. *Lambert v. California*, 355 U.S. 226, 78 S. Ct. 240 (1957).

Assuming, *arguendo*, that §§ 1461 and 1462 of Title 18, United States Code, have now been authoritatively construed as a result of this Court's decision in *Hamling*, no such authoritative construction was available at the time of petitioners' conviction in February of 1971 and, more importantly, at the time of the commission of the supposed offense.

3. Both §§ 1461 and 1462 of Title 18, United States Code, require that the conduct proscribed therein be done knowingly. The acts of which petitioners have been convicted were protected under judicial decisions rendered prior to *Miller* and *Hamling*. Petitioners were thus relying on earlier judicial construction to serve as a guide for their conduct. Therefore, assuming, *arguendo*, that the case law now adequately describes those kinds of conduct and activities which are proscribed, and that fair notice is now provided to all, such "clear" descriptions and guidelines were not available to petitioners at the time that the offenses were originally committed. Thus, the crucial and absolutely essential element of scienter is absent.

Mr. Justice Douglas, in delivering the opinion of the Court in *Lambert v. California, supra*, offered the following comments with respect to the question of knowledge:

> "On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required on a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are [citations omitted]. These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and *unaware of any wrongdoing, is brought to the*

> *bar of justice for condemnation in a criminal case.*" (Emphasis added.) (355 U.S. at 228, 78 S. Ct. at 243.)

The failure of the Government to establish the element of scienter, or knowledge, which is unquestionably an essential element of the instant offense, requires that the conviction be reversed as a matter of law. *In re Winship, supra,* 397 U.S. 358, 90 S. Ct. 1068 (1970).

4. Title 18, U.S.C., §§ 1461 and 1462 proscribe conduct in language so vague and confusing that "men of common intelligence must necessarily guess at its meaning and differ as to its application [thereby violating] the first essential of due process of law." *Connally v. General Construction Company,* 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926). This Court, however, has stated in *Hamling, supra,* that whatever vagueness previously existed in §§ 1461 and 1462 has now been removed as a result of its authoritative construction of those statutes. For the present, then, it appears that convictions for violations of these and similar sections may be sustained, and the offending materials may be suppressed. To impose imprisonment for the violation of statutes which have caused as much controversy and confusion as the two sections involved in the instant appeal is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

In *Trop v. Dulles,* 356 U.S. 86, 78 S. Ct. 590 (1958), this Court had occasion to consider the Eighth Amendment's prohibition against cruel and unusual punishment:

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed

by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. *The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.* While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment, and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of twelve years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States,* 217 U.S. 349, 30 S. Ct. 544. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."* (Emphasis added.) (356 U.S.

at 99 - 101, 78 S. Ct. at 597 - 598.)

Consequently, imposition of custodial punishment is violative of the Eighth Amendment prohibition against cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BURTON MARKS

A Member of BURTON MARKS
A PROFESSIONAL CORPORATION

Attorneys for Petitioners

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

MARVIN MILLER, COVINA PUBLISHING, INC., a corporation doing business as COLLECTOR'S PUBLICATION, Appellant, vs. UNITED STATES OF AMERICA, Appellee,

No. 23,935.

[Filed November 29, 1974]

Appeal from the United States District Court for the Central District of California.

On Remand from the Supreme Court

Before: BARNES, KILKENNY and TRASK, Circuit Judges.

PER CURIAM:

The decision and opinion of this court affirming convictions for having mailed obscene matter in violation of 18 U.S.C. § 1461, and for having transported obscene matter in violation of 18 U.S.C. § 1462 was dated September 16, 1970, and reported in 431 F.2d 655 (9th Cir. 1970). The Supreme Court, on June 25, 1973, vacated that judgment and remanded the cause to this court for reconsideration in the light of *Miller v. California*, 413 U.S. 15 (1973), and related cases. 413 U.S. 913 (1973).

Subsequent proceedings have kept the case in litigation.

Most recently it has been returned by the court en banc to the original panel for disposition. We now reaffirm the convictions and adopt our previously reported opinion in 431 F.2d 655, on the authority of *Miller v. California,* 413 U.S. 15 (1973), and *Hamling v. United States,* 42 U.S.L.W. 5035 (June 24, 1974).

We described the materials in our opinion, 431 F.2d at 658, and held that they were constitutionally obscene under the tests then prevailing. We find they are equally obscene under the tests of *Miller v. California, supra,* and *Hamling v. United States, supra.* We have considered the issues tendered by appellants in their rebriefing of the issues in the light of *Miller* and *Hamling.* We find that the arguments have been foreclosed to them by *Hamling* or are frivolous, *e.g.,* that a conviction and incarceration would constitute cruel and unusual punishment.

The judgment is reaffirmed.

LETTER DATED NOVEMBER 29, 1974

From the Office of the Clerk, United States Court of Appeals for the Ninth Circuit.

23935 - USA v. MARVIN MILLER, et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered November 29, 1974 AFFIRMING the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petiton.

Very truly yours,

Clerk
United States Court of Appeals

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

MARVIN MILLER, COVINA PUBLISHING, INC., a corporation doing business as COLLECTOR'S PUBLICATION, Appellant, vs. UNITED STATES OF AMERICA, Appellee.

No. 23,935.

[Filed January 27, 1975]

Before: BARNES, KILKENNY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States.

MARVIN MILLER, et al., Petitioners, vs. UNITED STATES.

No. A-680.

Upon consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 28, 1975.

William J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 19th
day of February, 1975.

ORDER RETURNING CASE TO ORIGINAL PANEL

In the United States Court of Appeals for the Ninth Circuit.

MARVIN MILLER, COVINA PUBLISHING, INC., a corporation doing business as COLLECTOR'S PUBLICATIONS, Appellants, vs. UNITED STATES OF AMERICA, Appellees.

No. 23, 935.

[Filed September 23, 1974]

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, BARNES, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, KILKENNY, TRASK, CHOY, GOODWIN, WALLACE and SNEED.

This case was taken en banc by order filed October 17, 1973. Upon vote of a majority of the judges, it is hereby ordered that the case be returned to the original panel, Judges Barnes, Kilkenny and Trask, for disposition.

For the Court

Charles M. Merrill
United States Circuit Judge

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MARCH 27, 1975, I served the within PETITION FOR WRIT OF CERTIORARI (No. A680) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012 (2 copies)

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20543 (3 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 27th, 1975, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca.
(714) 536-7161

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IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1115 and 74-1228

MARVIN MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

COVINA PUBLISHING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 74-1115 (Pet. App. A) is reported at 505 F.2d 1247.

The opinion of the court of appeals in No. 74-1228 (Pet. App. A) is reported at 507 F.2d 1100.

JURISDICTION

The judgment of the court of appeals in No. 74-1115 was entered on November 6, 1974. A petition for rehearing was denied on January 6, 1975 (Pet. App. C). On January 27, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 6, 1975 (Pet. App. D). The petition was filed on that date. The judgment of the court of appeals in No. 74-1228 was entered on November 29, 1974. Rehearing was denied on January 27, 1975 (Pet. App. C). On February 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 28, 1975 (Pet. App. D) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. (Both petitions): Whether 18 U.S.C. 1461 and 1462 were unconstitutionally vague prior to the decision in *Miller* v. *California*, 413 U.S. 15.

2. (Both petitions): Whether the claimed vagueness precluded a showing of intent under 18 U.S.C. 1461 and 1462 in a trial occuring prior to this Court's decision in *Hamling* v. *United States*, 418 U.S. 87.

3. (Both petitions): Whether incarceration imposed after convictions for violating 18 U.S.C. 1461

and 1462 constitutes cruel and unusual punishment.

4. (No. 74-1228): Whether petitioner's obscenity conviction under the national community standard is void because a local community standard was not applied.

5. (No. 74-1115): Whether a jury trial is required in all prosecutions under 18 U.S.C. 1461 and 1462.

STATEMENT

1. *No. 74-1228*: In 1968, after a jury trial in the United States District Court for the Central District of California, petitioners were convicted of five counts charging the mailing of obscene matter, in violation of 18 U.S.C. 1461. They were also convicted of two counts charging interstate shipment of obscene matter, in violation of 18 U.S.C. 1462. Petitioner Miller was sentenced to concurrent terms of five years' imprisonment on each count, and fined $2,500 on each of three counts. Petitioner Covina Publishing, Inc., was fined $5,000 on each of three counts. The sentences on the remaining counts were suspended and Covina was placed on five years' probation, on the condition that it obey all local, state, and federal laws, as well as the rules set by the probation officer. The court of appeals affirmed (431 F.2d 655).

On June 25, 1973, the petition for a writ of certiorari was granted, the judgment vacated, and the case remanded to the court of appeals in light of *Miller* v. *California*, 413 U.S. 15, and its com-

panion cases (No. 70-43, 413 U.S. 913).[1] Upon reconsideration, the court of appeals reaffirmed petitioners' convictions *per curiam* (No. 74-1228, Pet. App. A; 507 F.2d 1100).

The government's evidence at trial showed that petitioners were engaged in the sale and distribution of sex-oriented literature. More than thirty witnesses testified that they received or seized the charged materials from the mails and from interstate commerce (see, *e.g.*, 5 R 125-128, 136-138, 152, 207, 218, 233, 277-278, 6 R 316, 328-329; 7 R 498-499, 513-514).[2] These witnesses included teenagers, parents, school employees and women, many

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[1] Petitioner Miller was also the petitioner in *Miller* v. *California, supra.* There the judgment was vacated and the case remanded for further consideration. The conviction was reaffirmed and the appeal to this Court was dismissed for lack of a substantial federal question (418 U.S. 915). His appeal from subsequent proceedings in that case is presently before this Court in No. 74-1255.

The companion cases to *Miller* v. *California, supra,* are *Paris Adult Theatre I* v. *Salton,* 413 U.S. 49; *Kaplan* v. *California,* 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123; *United States* v. *Orito,* 413 U.S. 139; *Heller* v. *New York,* 413 U.S. 483; *Roaden* v. *Kentucky,* 413 U.S. 496; and *Alexander* v. *Virginia,* 413 U.S. 836.

[2] "R" refers to the record of the trial proceedings.

The materials which petitoners were charged with mailing and shipping were novels entitled "The Traveler's Companion," "The Guilded Lily," "Restless Love," and "The Misfortunes of Mary," books entitled "Female Photographs" and "Intercourse,' a magazine entitled "The Namei s Bonnie," a film entitled "Marital Intercourse," and advertisements giving information as to how the above materials might be obtained.

of whom had not solicited the materials. Others testified that they had never previously ordered sex-oriented materials, or that they had only ordered more conventional types of literature (see, *e.g.*, 5R. 224-226, 236; 6R. 299, 328, 330, 351-352, 357-358). The witnesses also included various postal employees who had either intercepted these materials in transit or who had themselves ordered the publications at the direction of their superiors (see, *e.g.*, 5R. 125-128, 146-147, 179-180, 184, 263-264).

The evidence also showed that approximately 300,000 envelopes containing three or four brochures for sex-oriented material[3] had been prepared and sent out for petitioners by a commercial mailer (8R. 710-712, 720). According to the mailer, these ads were sent to people on a mailing list purchased by Collector's Publication (Covina) (8R. 738). Petitioner Miller testified that between 500,000 and 600,000 ads for the book "Intercourse" were sent out (11R. 1292). He also testified that his mailing list, as well as the ones he purchased, were restricted to those people who had exhibited an interest in sex-oriented material (11 R. 1216, 1219-1220, 1222).

The government called one expert witness, Dr. David Henry Malone, professor and chairman of the Comparative Literature Department at the University of Southern California (8R. 616). In the opinion of Dr. Malone, all four "novels" at issue were di-

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[3] These included brochures for the film "Martial Intercourse," the book "Intercourse," the magazine "The Name is Bonnie" and an item entitled "Man Woman" (8R. 710-712).

rected towards the prurient interest of the reader (8R. 629-630, 634, 637-638, 640). In defense, petitioners produced several expert witnesses. Carolyn See, a doctor of literature, testified that the four "novels" at issue had redeeming social value and that none of the "novels" had as its sole purpose the arousal of sexual interest (9R. 439-840, 851, 858, 867).[4] Peter Wilins, a psychiatrist, testified that the book "Intercourse," the film "Marital Intercourse," and the magazine "The Name is Bonnie" had redeeming social value (10R. 1161-1162, 1165). Fred Goldstein, a doctor of psychology, also testified that the above three items had redeeming social value (10R. 1115-1116, 1119, 1147).

The book, magazines, and advertisements were introduced into evidence and the jury was given copies of the four books to read. (6R. 471-473, 479-480, 483).

2. *No. 74-1115*: In 1971, following a jury-wiaved trial in the United States District Court for the Central District of California, petitioner Miller was convicted of fifteen counts of mailing obscene material in violation of 18 U.S.C. 1461.[5] He was sentenced to two years' imprisonment and fined $22,500. The court of appeals affirmed (455 F.2d 899).

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[4] On cross-examination, Dr. See said that she could not conceive of any novel that is totally without literary merit (9R. 885).

[5] Covina Publishing, Inc., was also charged and convicted in the 1971 trial. Covina did not appeal that conviction.

On June 25, 1973, the petition for a writ of certiorari was granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of *Miller* v. *California*, *supra*, and its companion cases (No. 74-1517, 413 U.S. 913). Upon reconsideration, the court of appeals reaffirmed petitioner Miller's conviction (No. 74-1115, Pet. App. A; 505 F.2d 1247).

At the trial a stipulation regarding the testimony of thirty-four prosecution witnesses was presented in lieu of calling and examining the witness (Tr. 8). The substance of the stipulation was that these witnesses would testify that the advertisements charged in the indictment were received either by the addressees or by others at those addresses.* The advertisements were unsolicited. It was also stipulated that employees of the Postal Service received certain books and magazines pursuant to test purchases. The magazines which petitioner was convicted of mailing were entitled "Groovy Gypsy," "Pussy Willow," "Topsey Turvey," "Lovers," "Continental Cuties," "Parley," "Upon," and "Special." The books were entitled "Go Down Bruno," "Love Letters of Lauralee," and "My Sexy Aunt." The magazines contained close-up pictures of female genitals, gen-

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* The advertisements are described in the original opinion of the court of appeals (455 F.2d at 900-901). Some of the addresses were juveniles, and juveniles resided at other addresses where the materials were mailed. The material in one count was sent to a parochial school and the material in another count was sent to a Y.W.C.A. (Tr. 206; 455 F.2d at 901).

erally with legs spread and with bodies in grotesque positions (455 F.2d at 902). The books contained descriptions of sodomy, lesbian sexual acts, incest, and bestiality, including intercourse between a woman and a dog.

The government presented two expert witnesses, a professor of comparative literature and a psychiatrist, who testified that the books and magazines appealed to prurient interest and were utterly without redeeming social value (Tr. 17-23, 45-47). Additionally, Sheldon Heiman, a mail distributor for petitioner, testified that between 65,000 and 75,000 pieces of mail were sent out for petitioner on April 10, 11, and 12, 1969 (Tr. 60-62). The mailed items contained pictures of "males and females in various states of copulation and oral intercourse" (Tr. 61). It was stipulated that approximately 200,000 pieces of mail were entered at the post office for petitioner between June 20 and August 8, 1969 (Tr. 188).

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1461 and 1462 were unconstitutionally vague at the time of their trials, in light of this Court's subsequent decision in *Miller* v. *California*, 413 U.S. 15. This claim is insubstantial. Prior to *Miller*, this Court held that 18 U.S.C. 1461 was not unconstitutionally vague in *United States* v. *Reidel*, 402 U.S. 351 and *Roth* v. *United States*, 354 U.S. 476, 491-492.[7] After

[7] Petitioners' vagueness claim relates to the precision of the tests required to determine what is obscene. On this

Miller, this Court again reaffirmed that 18 U.S.C. 1461, as it had been construed prior to *Miller*, was not unconstitutionally vague. *Hamling* v. *United States*, 418 U.S. 87, 110-115. In *Hamling* this Court stated: "[a]t no point does *Miller* or any of the other obscenity decisions decided [during the 1972 Term] intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U.S.C. § 1461 was to be cast in doubt." 418 U.S. at 112.

Petitioners urge that even if the federal obscenity statutes were and are constitutional, their convictions must be reversed because materials similar to those involved here have been found not to be obscene in other decisions.[8] The claim is groundless. That petitioners may have misplaced their reliance on other decisions does not provide immunity from criminal liability. If a person, purportedly relying on judicial decisions, commits acts prohibited by the criminal law, he does so at his peril. See *United States* v. *Wurzbach*, 280 U.S. 396, 399.

Under the assumption that the materials here were not obscene prior to *Miller* and *Hamling*, petitioners urge that after *Miller* the obscenity statutes become *ex post facto* laws. They reason that the abrogation by *Miller* of the "socially redeeming value" test deprived them of an available defense. But the ma-

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point, there is no reason to distinguish section 1462, which prohibits, *inter alia*, interstate shipment of obscene matter, from section 1461, which prohibits mailing of such material.

[8] Petitioners do not cite any of the decisions to which they refer (Pet. No. 74-1228 11; Pet. No. 74-1115 9).

terials involved here were found to be obscene prior to *Miller*,[9] and *Miller* did not make any conduct criminal which was previously non-criminal. *Hamling* v. *United States*, *supra*, 418 U.S. at 116. Furthermore, the court of appeals examined the materials in light of *Miller* and again found them to be obscene (No. 74-1115, Pet. App. A; 505 F.2d 1247; No. 74-1228, Pet. App. A; 507 F.2d 1100). Thus petitioners' *ex post facto* contention is without substance.[10]

2. Petitioners urge that the government failed to prove that they knew the materials were legally obscene, and that such knowledge is an essential element of the offenses. That claim was, however, rejected in *Hamling* v. *United States*, *supra*, 418 U.S. at 123-124:

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[9] We rely upon the original opinions of the court of appeals, which found the materials to be obscene under pre-*Miller* standards (455 F.2d at 902; 431 F.2d at 658-659). We note that in No. 74-1228, petitioners challenged the obscene character of only one of the magazines at issue in the original appeal (431 F.2d at 658).

[10] Relying on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, petitioners erroneously contend that the materials involved here could only be seized for forfeiture, and could not constitute the subject of criminal prosecutions (Pet. No. 74-1115 at 10-11; Pet. No. 74-1228 at 12-13). *Calero-Toledo* holds that pre-seizure notice and hearing are not required in forfeiture proceedings, and that such proceerings are not unconstitutional when applied to the property interests of innocent parties. Nothing in that opinion suggests that *Hamling* v. *United States*, *supra*, *Miller* v. *California*, *supra*, and *Roth* v. *United States*, 354 U.S. 476, apply only to forfeiture cases.

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed upon the law. Such a formulation of the scienter requirement is neither required by the language of 18 U.S.C. 1461 nor by the Constitution.

Petitioners' knowledge of the nature and character of the materials is not disputed. Thus, they can not avoid conviction by claiming that they believed their acts to be lawful. See *United States* v. *Wurzbach*, *supra*, 280 U.S. at 399, quoted in *United States* v. *Hamling*, *supra*, 418 U.S. at 124.

3. Petitioner Miller contends that imprisonment for violations of the obscenity statutes constitutes cruel and unusual punishment because such statutes have been the subject of "controversy and confusion" (Pet. No. 74-1115 17; Pet. No. 74-1228 15). The court below in No. 74-1228 properly characterized the contention as frivolous (Pet. App. A at 2; 507 F.2d at 1101). Disagreement as to the scope of statutes may give rise to challenges to their application in a particular case, but it does not make imprisonment for violation of their terms, as properly applied, cruel and unusual punishment. See *United States* v. *Hamling*, 481 F.2d 307, 312 (C.A. 9), affirmed, 418 U.S. 87. See also *United States* v. *Hill*, 500 F.2d 733, 740 (C.A. 5).

4. In No. 74-1228, petitioners contended that they are entitled to a new trial in order to introduce evidence of local community standards in light of the obscenity test articulated in *Miller* v. *California*, *supra*. Petitioners were, of course, tried prior to the *Miller* decision, and the jury's instructions were properly based on a national standard under the *Roth-Memoirs* test of obscenity then in effect.[12]

Petitioners' claim is foreclosed by this Court's decision in *Hamling* v. *United States*, 418 U.S. 87, which involved obscenity convictions that occured, and were affirmed by the court of appeals, prior to *Miller*. In *Hamling* this Court held that the *Miller* decision "did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula * * *," but that whether a national or local standard is used, the jury's determination must be objective and not subjective. *Hamling* v. *United States*, *supra*, 418 at 104. Petitioners do not claim that the materials here were judged by a subjective rather than an objective standard.

The jury found the materials to be obscene under the *Roth-Memoirs* test, and, but for one magazine, that finding was not challenged in the court of appeals. On remand, the court of appeals found the materials also to be obscene under the *Miller* formulation (No. 74-1228, Pet. App. A). In these circumstances, it is not necessary that a new trial be held so that a jury may determine the obscene nature of

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[12] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

the materials under *Miller*. See *United States* v. *Ratner*, 502 F.2d 1300, 1302 (C.A. 5) (*per curiam*) petition for writ of certiorari pending, No. 74-1282; *United States* v. *Alexander*, 498 F.2d 934, 936 (C.A. 2); *United States* v. *Groner*, 494 F.2d 299 (C.A. 5), certiorari denied, November 11, 1974, No. 73-1932.

The court of appeals properly made an "independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio*, 378 U.S. 184, 190.

5. In No. 74-1115, petitioner Miller presents the following question (Pet. 3):

> Whether a jury trial is constitutionally mandated in every Federal prosecution brought pursuant to Title 18, U.S.C., §§ 1461 and 1462?

Petitioner waived a trial by jury and does not challenge that waiver. Thus, he has no standing to raise this issue. In any event, the contention is insubstantial. Nothing in the language or legislative history of 18 U.S.C. 1461 and 1462, or in any of this Court's decisions, suggests that trial by jury is mandated in obscenity prosecutions.

Petitioner further urges that a California jury could not constitutionally find the materials here to be obscene.[13] According to petitioner, the California Supreme Court held that "lewd exhibition of genitilia" is not obscene as a matter of law in *People* v. *Noroff*, 67 Cal. 2d 791, and *In Re Panchot*, 70 Cal. 2d 105, and he asserts therefore that a California

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[13] Petitioner presumably intends this argument to apply equally to the bench trial here.

jury could not find the materials involved here to be obscene.

Petitioner, however, misconceives the relationship between state and federal law. However, California courts may construe state obscenity statutes,[14] their construction would not be binding in federal prosecutions. Moreover, in the California decisions cited by petitioner, nude photographs were found not to be obscene because they did not involve sexual acticity. *People* v. *Noroff*, *supra*, 67 Cal. 2d at 794-795; *In Re Panchot*, *supra*, 70 Cal. 2d at 108-109. The original opinion of the court of appeals shows that the materials which petitioner was convicted of mailing in No. 74-1115 dealt with sexual activity. 455 F.2d 899.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys.

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[14] The California decisions cited by petitioner involved a construction of the term "obscene" as used in Cal. Penal Code, Section 311.

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